



Office of the Attorney General  
State of Texas

June 24, 1993

DAN MORALES

ATTORNEY GENERAL

Mr. Ronald J. Neiman  
Neiman & Barnes  
P.O. Box 777  
Lewisville, Texas 75067

OR93-350

Dear Mr. Neiman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18893.

The City of Lewisville (the "city"), which you represent, has received a request for information relating to city trench safety standards. Specifically, the requestor seeks three categories of information:

1. All records kept by the Utility Line Maintenance Department or the city relating to employee training for trench safety techniques from 1988 to present. The records should include the names of all employees who received such training and dates they received such training.
2. All safety procedural and instruction manuals or documents pertaining to trench safety possessed by the city prior to March 1992 and after March 1992.
3. All investigative records, documents and memos relating to trench cave-in accidents in the city from 1988 to present.

You do not object to release of some of the requested information. You have submitted to us for review, however, the remaining information and claim that it is excepted from required public disclosure by sections 3(a)(3) and 3(a)(11) of the Open Records Act.

You claim that four of the documents submitted to us for review, items 2 through 5, are excepted from public disclosure by section 3(a)(3) of the Open Records Act. Section 3(a)(3), the "litigation exception," excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

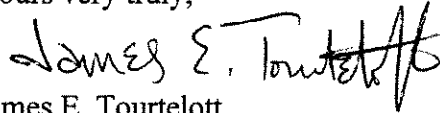
You advise us that items 2 through 5 contain information relating to the worker's compensation claims filed by the injured parties. You do not indicate, however, that litigation is pending in this matter or may be reasonably anticipated. We conclude, therefore, that items 2 through 5 may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act and must be released in their entirety.

You also claim that item 1 constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure. For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992), the Third Court of Appeals recently held that § 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review item 1 and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the item 1, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released item 1.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in black ink, appearing to read "James E. Tourtelott", with a stylized flourish at the end.

James E. Tourtelott  
Assistant Attorney General  
Opinion Committee

JET/GCK/lmm

Ref.: ID# 18893

cc: Mr. James Florez  
Staff Writer  
Lewisville News  
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